basis for a challenge of a state's policies on dormant Commerce Clause grounds. Matters such as these should be left to the legislature, and if sufficient members of the public are unhappy with the policies, the appropriate recourse is to be found at the ballot box, not at the courthouse. Hence, particularly for challenges to tax policies on dormant Commerce Clause grounds, the plaintiff should be required to allege some particularized and specific basis of injury.

CONCLUSION

For the foregoing reasons, the Washington Legal Foundation respectfully urges this Court to decide that (1) the economic incentives granted by Ohio in the form of investment tax credits that can be used prospectively do not violate the dormant Commerce Clause and (2) the Plaintiffs herein lacked proper standing to bring an action challenging Ohio's tax policies on grounds that it was inconsistent with the dormant Commerce Clause.

Respectfully submitted,

J. Pat Powers
Baker & McKenzie, LLP
660 Hansen Way
Palo Alto, California 94304
(650) 856-5526

Daniel J. Popeo
David Price
Counsel of Record
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

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APPENDIX A

State	Credit/Incentive Type	Reference
Alabama	"Alabama Enterprise Zone Act" Incentive Tax Credits	Ala. Code § 41-23-20 et. seq.; § 40-18-190 et seq.
Alaska	Mineral Mining Exploration Incentive Tax Credit	Alaska Stat. § 27.30.010 et seq.
	Oil and Gas Exploration Incentive Tax Credit	Alaska Stat. § 38.05.180; Alaska Stat. § 41.09.010 et seq.
Arizona	Enterprise Zone Employment Incentive Tax Credit	Ariz. Rev. Stat. Ann. § 41-1521 et seq.; Ariz. Rev. Stat. Ann. § 43-1161
	Arizona Research and Development Incentive Tax Credit	Ariz. Rev. Stat. Ann. § 43-1168
Arkansas	Biotechnology Development and Training Incentive Tax Credit	Ark. Code Ann. § 2-8-101 et seq.
	"Emerging Technology Development Act" Incentive Tax Credit	Ark. Code Ann. § 15-4-2103 et seq.

California	California Research and Development Incentive Tax Credit	Cal. Rev. & Tax. Code § 23609
	Enterprise Zone Hiring Incentive Tax Credit	Cal. Rev. & Tax. Code § 23622.7
Colorado	Enterprise Zone Investment Incentive Tax Credits	Colo. Rev. Stat. § 39-30-103 et seq.
Connecticut	Connecticut Research and Experimental Expenditures Incentive Tax Credit	Conn. Gen. Stat. § 12-217j
	Enterprise Zone Incentive Tax Credits	Conn. Gen. Stat. §§ 12-217e, 12-217v
Delaware	Delaware Research and Development Incentive Tax Credit	Del. Code Ann. tit. 30, § 2070 et seq.
District of Columbia	"Economic Development Zone Incentives Act" Tax Credits	D.C. Code §§ 6-1501, 6-1504, 47-1807.04, 47-1808.07
Florida	Enterprise Zone Incentive Tax Credits	Fla. Stat. § 290.007
Georgia	Georgia Research and Development Incentive Tax Credit	Ga. Code Ann. § 48-7-40.12
Hawaii	High Technology Business Investment Incentive Tax Credit	Haw. Rev. Stat. § 325-110.9
	Hawaii Research and Development Incentive Tax Credit	Haw. Rev. Stat. § 325-110.91

Idaho	Idaho Research and Development Incentive Tax Credit	Idaho Code Ann. § 63-3029G
	"The Idaho Corporate Headquarters Incentive Act of 2005" Tax Credits	Idaho Code Ann. § 63-2901 et seq.
Illinois	Illinois Research and Development Incentive Tax Credit	35 Ill. Comp. Stat. 5/201(k)
	Enterprise Zone Investment and Hiring Incentives Tax Credits	35 Ill. Comp. Stat. 5/201(f); 35 Ill. Comp. Stat. 5/201(g)
Indiana	Indiana Research and Development Incentive Tax Credit	Ind. Code § 6-3.1-4-1 et seq.
Iowa	Iowa Research and Development Incentive Tax Credit	Iowa Code § 422.33(5)
	Enterprise Zone Incentives Tax Credits	Iowa Code § 15A.9; Iowa Code § 5E.191 et seq.; Iowa Code § 15E.232
Kansas	Kansas Research and Development Incentive Tax Credit	Kan. Stat. Ann. § 79-32,182b
Kentucky	Kentucky Research Facilities Construction Incentive Tax Credit	Ky. Rev. Stat. Ann. § 141.395
Louisiana	Louisiana Research and Development Incentive Tax Credit	La. Rev. Stat. Ann. § 47:6015

Maine	Maine Research and Development Incentive Tax Credit	Me. Rev. Stat. Ann. tit. 36, § 5219-K
Maryland	Maryland Research and Development Incentive Tax Credit	Md. Code Ann. Tax-Gen. § 10-721
	Qualified Business Expansion and Hiring Incentive Tax Credit	Md. Code Ann. Tax-Gen. § 10-704.8; Md. Code Ann. Tax-Prop. § 9-230
Massachusetts	Massachusetts Research and Development Incentive Tax Credit	Mass. Gen. Laws ch. 63, § 38M
Michigan	Michigan Pharmaceutical Research Incentive Tax Credit	Mich. Comp. Laws § 208.39f
	Renaissance Zone Incentive Tax Credits	Mich. Comp. Laws §§ 125.2686, 208.39b
Minnesota	Minnesota Research and Development Incentive Tax Credit	Minn. Stat. § 290.068
Mississippi	Manufacturers', Distributors' and Merchants' Qualified Property Incentive Tax Credit	Miss. Code Ann. § 27-7-22.5
	"Mississippi Broadband Technology Development Act" Qualifying Equipment Investment Incentive Tax Credit	Miss. Code Ann. § 57-87-5

Missouri	Expanded Business Facilities Incentive Tax Credit	Mo. Rev. Stat. §§ 135.100, 135.150, 135.155
	Missouri Research and Development Incentive Tax Credit	Mo. Rev. Stat. § 620.1039
Montana	Montana Research and Development Incentive Tax Credit	Mont. Code Ann. § 15-31-150(1)
Nebraska	Enterprise Zone Incentive Tax Credits	Neb. Rev. Stat. § 77-2734.03
New Hampshire	Community Reinvestment and Opportunity Zone Incentive Tax Credits	N.H. Rev. Stat. Ann. § 162-N:1 et seq.; N.H. Rev. Stat. Ann. § 77-A:5, XII; N.H. Rev. Stat. Ann. § 77-E:3-a
New Jersey	New Jersey Research and Development Incentive Tax Credit	N.J. Stat. Ann. § 54:10A-5.24
New Mexico	Enterprise Zone Incentive Tax Credits	N.M. Stat. § 7-2A-15 (1978)
New York	Qualified Emerging Technology Company Employment Incentive Tax Credit	N.Y. Tax Law § 210(12-E)
North Carolina	"William S. Lee Quality Jobs and Business Expansion Act" Incentive Tax Credits	N.C. Gen. Stat. § 105-129.2 et seq.
North Dakota	North Dakota Research and Development Incentive Tax Credit	N.D. Cent. Code § 57-38-30.5

Oklahoma	Enterprise Zone Incentive Tax Credits	Okla. Stat. 62 § 690.4; Okla. Stat. 68 § 2357.81
Oregon	Oregon Research and Development Incentive Tax Credit	Or. Rev. Stat. § 317.152
	Enterprise Zone Incentive Tax Credits	Or. Rev. Stat. § 285C.406; Or. Rev. Stat. § 285C.400; Or. Rev. Stat. § 317.124; Or. Rev. Stat. § 315.507
Pennsylvania	Pennsylvania Research and Development Incentive Tax Credit	Pa. Stat. Ann. 72 § 8701-B et seq.
Rhode Island	Rhode Island Research and Development Incentive Tax Credit	R.I. Gen. Laws § 44-32-3
South Carolina	South Carolina Research and Development Incentive Tax Credit	S.C. Code Ann. § 12-6-3415
	Corporate Income Tax Moratorium For Job Creation	S.C. Code Ann. § 12-6-3365
Tennessee	Jobs Creation Incentive Tax Credit	Tenn. Code Ann. § 67-4-2109(c)(2)
Texas	Texas Research and Development Incentive Tax Credit	Tex. Tax Code Ann. § 171.722
	Jobs Creation Incentive Tax Credit	Tex. Tax Code Ann. § 171.751 et seq.

Utah	Utah Research and Development Incentive Tax Credit	Utah Code Ann. § 59-7-612
Vermont	Vermont Research and Development Incentive Tax Credit	Vt. Stat. Ann. tit. 32, § 5930w
Virginia	Virginia Research and Development Incentive Tax Credit	Va. Code Ann. § 58.1-439.14
	Major Business Facility Jobs Creation Incentive Tax Credit	Va. Code Ann. § 58.1-439
Washington	Job Training Incentive Tax Credit	Wash. Rev. Code § 82.04.4333
	Washington Research and Development Incentive Tax Credit	Wash. Rev. Code § 82.04.4452
West Virginia	West Virginia Research and Development Incentive Tax Credit	W. Va. Code § 11-13R-1 et seq.
Wisconsin	Wisconsin Research and Development Incentive Tax Credit	Wis. Stat. § 71.28
	Development Zone Incentive Tax Credits	Wis. Stat. § 71.28(1dx)

(36) (27)

Nos. 04-1704, 04-1724

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In The
Supreme Court of the United States

DAIMLERCHRYSLER CORP., et al.,

Petitioners,

v.

CHARLOTTE CUNO, et al.,

Respondents.

and

WILLIAM W. WILKINS,
Tax Commissioner etc., et al.,

Petitioners,

v.

CHARLOTTE CUNO, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE WAYNE COUNTY, MICHIGAN, IN SUPPORT OF PETITIONERS

EDWARD M. THOMAS
Wayne County
Corporation Counsel
*MELVIN BUTCH HOLLOWELL
ALLEN BROTHERS, PLLC
Attorneys for Wayne County
400 Monroe St., Ste. 220
Detroit, MI 48226
(313) 962-7777
Attorneys for Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICUS CURIAE[1]

Wayne County is the largest county in Michigan, with a population of over two million. It was once headquarters to all of "The Big Three." Petitioner DaimlerChrysler is headquartered in an adjacent county. Wayne County is still headquarters to Ford Motor Co. and General Motors Corp. Many of the Big Three manufacturing facilities, along with the facilities of Petitioner DaimlerChrysler Corp., are located in Wayne County, in part, because of tax incentives enacted by both the Michigan legislature and Wayne County government.

Wayne County, has the power to levy property taxes and the power to enact tax incentives like the incentives being challenged in this case. (Wayne County Charter, § 5.181). Not surprisingly, given Wayne County's prominence in the world's automotive and manufacturing history, it is the policy of Wayne County to capture and encourage industrial and economic growth.

Wayne County has a vital interest in assuring that disgruntled citizens, such as Respondents, not be allowed to use the courts to overrule the legislative and policy decisions of duly elected lawmakers. If the decision of the Sixth Circuit is allowed to stand in this case, persons from inside and outside the jurisdiction – regardless of injury or motive – will have the imprimatur of this Court to attack the self-governance principles inherent in a republican form of government. The separation of powers requires

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[1] Under Supreme Court Rule 37.6, amicus curiae state that no counsel for a party has written this brief in whole or in part, and no entity or person, other than the amicus curiae, has made a contribution to the preparation or submission of this brief.

that Respondents – and, indeed, all citizens – effect policy decisions through their elected officials, and not through the Court.[2]

STATEMENT OF THE CASE

In 1998, Toledo, Ohio – which is only 20 miles from the southern border of Wayne County – and two local school districts provided a $281 million tax incentive to DaimlerChrylser to encourage it to continue its manufacturing presence in those communities. The Ohio statutory scheme permitting the investment tax credit was enacted "to encourage industrial investment and development in Ohio, particularly in economically troubled areas." *Cuno v. DaimlerChrysler, Inc.*, 154 F. Supp. 1196, 1198, 1201 (2001). The Ohio economy like Michigan's is heavily reliant on the manufacturing and automobile industries, and has suffered through an exodus of jobs.

Respondents, plaintiffs below, filed a law suit challenging the constitutionality of the incentives under the Commerce Clause and the Equal Protection Clause of the United States Constitution. Respondents are individual residents of Ohio, individual residents of Michigan, two Ohio small businesses, and one not-for-profit Ohio corporation. Respondents do not allege any specific injury as a result of the Ohio investment tax credit statute but, rather, seek to "free all the states from the necessity of engaging in escalating competition over incentives that deprives all of them of needed revenues, while gaining a

[2] *See DeShaney v. Winnebago Co. Dep't of Social Services*, 489 U.S. 189, 203 (1989).

meaningful competitive edge for none." (Op. Cert. at 6). Respondents further argue that investment tax credits are bad public policy (Op. Cert. at 6).

The United States District Court for the Northern District of Ohio found that the challenged statute's purpose "constitutes a legitimate state interest that clearly has a rational nexus" to the tax credit. *Id.* at 1201. The court found that "[n]otwithstanding Plaintiffs' innovative arguments" Ohio's investment tax credit does not violate the Commerce Clause. *Id.*

A panel of the United States Court of Appeals for the Sixth Circuit held that the investment tax credit statute (Ohio Rev. Code Ann. § 5733.33) is unconstitutional under the Dormant Commerce Clause of the United States Constitution because "the tax credit involves state regulation of interstate commerce through its power to tax" even though the investment tax credit "is equally available to in-state and out-of-state businesses." *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 743, 746 (6th Cir. 2004). The court did not address standing.

This Court granted certiorari and directed the parties to brief the following question: whether Respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code Ann. § 5733.33. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 36 (2005).

SUMMARY OF ARGUMENT

I

This Court does not sit as a "super-legislature" to second-guess the desirability of statutes. The states may,

"within extremely broad limits," experiment with different economic philosophies. Thus, even if this Court were to find Ohio's tax statutes unwise or ineffective, this Court is still obligated by the Constitution to tolerate what it may regard as a legislative mistake. Founded in 1796, before Michigan was admitted to the Union, amicus Wayne County's experience is that tax incentives are both effective and necessary. Wayne County maintains that it is good government to utilize tax resources for economic viability.

II

Respondents lack standing to challenge the constitutionality of Ohio's tax incentive statutes because Respondents have not suffered an "injury in fact" as a result of those statutes nor is it likely that their alleged grievances would be redressed by a favorable decision of this Court.

III

The Sixth Circuit has misapplied longstanding precedent in the area of interstate commerce, as the tax incentives provided by Ohio, and by jurisdictions like Wayne County do not constitute an undue burden on interstate commerce, in violation of the Dormant Commerce Clause.

ARGUMENT

I

THIS COURT DOES NOT SIT AS A SUPER-LEGISLATURE DECIDING STATE POLICY, THUS, RESPONDENTS CANNOT INVOKE THIS COURT'S JURISDICTION TO IMPOSE POLICY ON THE STATES

The question before this Court is not whether the Ohio tax incentive statute is wise or unwise, desirable or undesirable. *James v. Strange*, 407 U.S. 128, 133 (1972). *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 339 (1969). The question before this Court is not what economic philosophy Ohio should or should not embrace. *Id.* The question before this Court is not whether Ohio's statute is effective or ineffective. The sole question before this Court is whether the statute is constitutional. *James*, 407 U.S. at 133.

This Court has repeatedly held that it does not sit as "a super-legislative body." *Sniadach*, 395 U.S. at 339. *Day-Brite Lighting v. State of Missouri*, 342 U.S. 421, 423 (1952). But, rather, "state legislatures have constitutional authority to experiment with new techniques . . . [and] they may within extremely broad limits control practices within the business-labor field so long as specific constitutional prohibitions are not violated." *Id.* Indeed, this Court need not concur in those legislative policies to hold the enactments constitutional. *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952). Judicially this Court is obligated by the Constitution to tolerate what it may regard as a legislative mistake. *Id.* Misguided laws may nonetheless be constitutional. *James*, 407 U.S. at 133.

Thus, it is Respondents' considerable burden to prove, not that tax incentive statutes are unwise, but that they are unconstitutional. *Id.*

A. Tax Incentives Are Vital to Wayne County's Economy

Wayne County is the largest county in the State of Michigan and the eleventh largest in the nation. It is comprised of 44 cities, including Detroit. It is historically, and culturally fused with the automobile industry and heavy manufacturing. There have been thoughtful efforts to diversify the economy by working to attract and develop business growth in high technology, service, tourism, entertainment, and health care industries. But Wayne County is the home of the automobile. Wayne County's citizens work in its factories, and Wayne County's economy rises and falls with the number of cars purchased by consumers.

For 30 years Wayne County's economy has been in serious decline. Its unemployment rate of six percent is the highest in the nation. A recent study conducted by the Initiative for a Competitive Inner City, indicates that Wayne County's largest city, Detroit, lost more jobs between 1995 and 2003 than any other large American city. Detroit has 400,000 fewer jobs today than it had in 1970.

As a result of these economic challenges, Wayne County and other similarly situated municipalities have needed to employ a strategy to assist the businesses that are already located in Wayne County and to attract new ones. One of those strategies is providing tax incentives to those businesses in return for job creation.

Michigan Public Act 198 of 1974 allows a 50 percent reduction in local property taxes to businesses for the renovation expansion, or new construction of manufacturing plants in Michigan. Wayne County is eligible to grant abatements under this statute, and has done so with success. Overall, this program has resulted in the creation of 500,000 new jobs and the creation of 1.3 million jobs throughout Michigan.

Michigan Public Act 328 of 1998 is targeted at "distressed" communities, abating all (100%) new personal property taxes in designated geographic areas. Wayne County has taken advantage of this for businesses within its boundaries.

Michigan Public Act 146 of 2000, known as the obsolete Property Rehabilitation Act, encourages the redevelopment of obsolete buildings by freezing taxes on the property for up to 12 years.

Tax Increment Finance Authority Districts have been established in Wayne County to capture and re-invest taxes for the development of projects such as Ford Field, home of the Detroit Lions, and the Detroit Tigers' Stadium known as Comerica Park. Both stadiums have created thousands of jobs in the county and metro region.

Other tax incentives have been employed with success by Wayne County, such as the "Brownfield" program which encourages the development of sites that are contraindicated. Up to $1 million in credits are available.

A newer program created by the state, called the Michigan Economic Growth Authority, provides tax incentives for development in the areas of high technology and research and development.

These programs are the life-blood of Wayne County's job retention efforts. Wayne County must be able to utilize these tools to survive in an increasingly tough economic climate.

Many business, which are automotive suppliers or automotive related, would prefer to be physically proximate to the auto companies based in Wayne County. Being close to the customer provides economies of scale for distribution and supply. But these suppliers and automotive related companies, which form the backbone of Wayne County's job base, will locate elsewhere if the overall cost of doing business is lower elsewhere. Taxes are not the only factor, but they are certainly a key factor.

The use of tax incentives to preserve Wayne County's job base is not an abstract economic theory, it is a means to assist County citizens from the crisis of losing a job, and the devastation that flows from it including lost homes, health care, and the ability to buy groceries.

Wayne County is, therefore, committed to utilizing these tax incentives as one effective tool in preserving its economic base and way of life.

There are a number of factors that a company takes into account when deciding whether doing business in a particular locale makes sense. Some of those factors include: the availability of workers; the opportunity to grow; the regulatory environment; competition; access to health care; location; and taxable costs of doing business. There are other important, non-bottom line factors which are considered, such as quality of life issues.

It is Wayne County's economic development experience that the taxable cost of doing business rates high on